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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

SUN CARRIERS, INC.; ALBERT L. LABINGER; DONALD E. MAYORAS; MILNE TRUCK LINES; ELLIOTT BURNSIDE; CHARLES N. PASS; THOMAS MORTON; JAMES BRADFORD; ST. JOHNSBURY TRUCKING; JONES TRUCK LINES; RIORDAN FREEMAN & SPOGLI; RICHARD J. RIORDAN; BRADFORD M. FREEMAN; RONALD P. SPOGLI,
Petitioners,

VS.

MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual Benefit Corporation, or in the alternative Steven Bishop, Charles E. Tharp, Debra Bishop and Ella Tharp, as representatives of the class of affected former employees of Milne Truck Lines, Inc., and their spouses,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PRELIMINARY STATEMENT

The Solicitor General, at the invitation of this Court, has filed a brief advising the Court to deny the petition for writ of certiorari. The Solicitor General's advice is ill-founded, and petitioners urge this Court to grant the petition.

The United States presumably has the greatest interest in the second "Question Presented" — whether respondents' state law claims are preempted under the principles of *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959) — because of the jurisdictional concerns of the National Labor Relations Board (the "Board"). With respect to this question, the Solicitor General agrees with petitioners that the conduct alleged is arguably prohibited under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("the Act") and that the Ninth Circuit erred in holding otherwise. The Solicitor General also takes issue with the Ninth Circuit's conclusion that the state law claims are not sufficiently identical with the unfair labor practice charge that would be before the Board and criticizes the Ninth Circuit for ignoring this Court's decision in *Operating Engineers v. Jones,* 460 U.S. 669 (1983). Despite the Solicitor General's disagreement with the Ninth Circuit's decision, he states that review of the decision is unwarranted because he does not perceive clear conflict among the circuit courts of appeals. The Solicitor General seriously misapprehends the nature of the conflicts presented by the Ninth Circuit's decision and he overlooks, as an independent reason for granting certiorari, the Ninth Circuit's departure from this Court's decisions in *Garmon* and *Jones.*

With respect to the first "Question Presented" — preemption under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301") — the Solicitor General agrees with the Ninth Circuit that respondents' state law claims for fraud and emotional distress are not preempted. Although the Solicitor General admits that several courts have reached the opposite conclusion under similar facts, he urges the Court to deny review because he believes that the conflict is not sufficiently clear. No clearer conflict could be presented. Moreover, the Solicitor General ignores the self-admitted confusion over Section 301 preemption rampant in the lower courts, which underscores the need for this Court's intervention. Even if the Solicitor General were correct that the conflict in the circuits is not precisely defined, this

Court should nonetheless clarify these recurring and important questions of federal law, which have left the lower courts befuddled and uniform national labor policy an elusive ideal.

I.

THE NINTH CIRCUIT'S DECISION PRESENTS A CLEAR CONFLICT WITH OTHER CIRCUIT COURTS' SECTION 301 DECISIONS AND DEPARTS FROM THE AUTHORITY OF THIS COURT.

The Solicitor General agrees with the Ninth Circuit's conclusion that Section 301 does not preempt respondents' state law claims for fraud and emotional distress based on allegations that they were falsely promised job security after Milne had allegedly decided to close its trucking facility. The Solicitor General's opinion on the merits of the controversy, of course, is secondary to the issue of whether review is justified; a few points, however, should be addressed.

Petitioners do not generally quarrel with the Solicitor General's proposition that Section 301 preemption depends upon the existence of a term in the collective bargaining agreement which affects the outcome of the state law claim. Petitioners do dispute the Solicitor General's requirement that Section 301 preemption depends upon a specific term in the collective bargaining agreement which prohibits the precise conduct complained of. Indeed, following the Ninth Circuit's lead, the Solicitor General suggests that the only term which could affect an employee's justifiable reliance on alleged false promises of job security would be one which would "reserve to Milne the right to make false statements regarding its intentions to close terminals in a manner that causes damage to others," a provision which would be illegal under state law and for which Milne could not lawfully contract. (Solicitor General's Br. at 7.) Because no collective bargaining agreement can meet this requirement lawfully, the Solicitor General implicitly contends that a state law fraud claim could never be preempted by Section 301.

The several circuit courts which have deemed similar fraud claims preempted have obviously rejected such a restrictive view of Section 301 preemption, as discussed *infra*. Instead, these courts recognize that when a court's resolution of a state law claim involves an

assessment of the reasonable expectations of union employees and the power of the employer, the collective bargaining agreement plays a crucial and pivotal role.

This Court, too, has rejected such a narrow view of "contract interpretation." In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Court did not examine the collective bargaining agreement to make sure a specific term permitted the employer to harass employees who filed disability claims as alleged by the plaintiff; in fact, the Court pointedly eschewed such a narrow reading of a collective bargaining agreement, and left it to the arbitrator to determine if the manner of processing disability claims violated any express or implied duty in the contract. *Id.*at 218-20.

In this case, however, rather than leaving to the arbitrator the task of assessing the reasonableness of employees' reliance on the alleged fraudulent representations, the Solicitor General would give that task to a jury with the instruction that the collective bargaining agreement is irrelevant to its consideration of the issue. It is not irrelevant. The Solicitor General minimizes the importance of the several provisions in the pertinent collective bargaining agreements including one which prohibits Milne from making any individual employee contracts which "in any way" conflict with the collective bargaining agreements. (Solicitor General's Br. at 7 n.8.) If an alleged individual agreement promising job security is enforceable, it does conflict with Milne's right to shut down its operations, which, as the Solicitor General assumes, is a right reserved to Milne in the collective bargaining agreements. The reasonableness of a union employee's reliance on a promise of indefinite job security, as alleged by respondents, can only be assessed by considering the circumstances of his employment, including his knowledge that the terms and conditions of his employment are governed by a collective bargaining agreement. When that collective bargaining agreement provides that the employer enjoys the exclusive right to dictate operational requirements — including how long employees will remain employed — the collective bargaining agreement plays a pivotal role in assessing a union employee's reasonable reliance on a promise of indefinite employment.[1]

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[1]Even the Ninth Circuit recognized the tension between the alleged individual promises and collectively bargained agreements. It determined that

The Solicitor General, then, is mistaken in his view that an employee's reasonable reliance on alleged individual promises of job security is divorced from the different expectation of job security set forth in the collective bargaining agreement. Any individually "negotiated" restriction on Milne's right to shut down — such as an enforceable promise of job security — necessarily conflicts with Milne's contract rights, triggers the "no-conflicts" provision in the collective bargaining agreement, and inextricably links an employee's justifiable reliance on the individual promise with the collective bargaining agreement. More significantly, the Solicitor General is mistaken in his view that a state court jury would have no cause to interpret the collective bargaining agreement in order to determine if the employees reasonably relied on the allegedly false promises of job security.

Although the Solicitor General acknowledges that other courts of appeals have deemed similar claims in analogous circumstances preempted, he contends that the conflict is not precise. The Solicitor General summarily dispenses with several cases in petitioners' brief because they were decided before *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). (Solicitor General's Br. at 9 n.11.) There is no suggestion — even by the Solicitor General — that these

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respondents' contract claims (based on the same alleged promises of job security) were preempted by Section 301 because the "scope" of the employees' right to job security is a function of the collective bargaining agreements, and the collective bargaining agreements address "what types of disruption of the contractual or economic relationship between Milne and the employees are allowed." (Petition at 14a, 16a.) The analysis should not change merely because the allegations are relabeled as "fraud" claims. Otherwise, the nonsensical result is that the employees may not ignore the terms of the collective bargaining agreements and may not rely on alleged misrepresentations to form individual contracts but may ignore the same collective bargaining agreements and rely on those same alleged misrepresentations to maintain a state law claim for fraud. Even if respondents' allegations were true, where, as here, Milne did nothing more than what it was entitled to do under the collective bargaining agreement, i.e., shut down the plant, the propriety of its conduct should be governed by that agreement. See *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 662 (7th Cir. 1992) (claim for fraud based on termination of employment preempted by Section 301 when employer merely exercises rights under collective bargaining agreement, thereby requiring its interpretation).

cases would have been decided differently after *Lingle* or that their holdings or analyses are or should be viewed with disfavor. To the contrary, cases such as *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986), have been followed post-*Lingle*, (*see, e.g., Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) *cert. denied*, 490 U.S. 1066 (1989)), and they should not be ignored. The pre-*Lingle* cases reject the Solicitor General's analysis, just as they conflict with the Ninth Circuit's decision. (See Petition at 9-10.)

The Solicitor General acknowledges that *Dougherty v. American Telephone & Telegraph Co.*, 902 F.2d 201 (2d Cir. 1990), reached a result opposite to the Ninth Circuit under similar circumstances, but states that the collective bargaining agreement was not sufficiently discussed in the Second Circuit's opinion to give rise to a clear conflict. It is evident from the Second Circuit's opinion, however, that the court did not expect the collective bargaining agreement to fulfill the Ninth Circuit's and Solicitor General's requirement that there be an express provision giving the employer the right to lie about plant closure. The Second Circuit simply recognized that any obligation to accurately disclose plans to shut down was a function of the collective bargaining agreement and the aggrieved employees were limited to the grievance and arbitration remedy provided therein. *Id.* at 204.

The Solicitor General's treatment of *Smith v. Colgate Palmolive Co.*, 943 F.2d 764 (7th Cir. 1991), is even more cursory. He simply suggests that no conflict between the circuits exists because the Seventh Circuit found that plaintiffs' fraud claim, in particular, the element of reasonable reliance, implicated the terms of the collective bargaining agreement, whereas the Ninth Circuit reached the opposite conclusion (precisely the conflict petitioners contend justifies review by this Court). (Solicitor General's Br. at 11-12.) The most striking conflict, however, is that in *Smith* the court presumed it was the arbitrator's province to assess the employees' reasonable reliance on promises of job security upon transfer in light of a "merger" clause and a provision in the collective bargaining agreement which provided for loss of seniority upon transfer. *Id.* at 771. Milne's collective bargaining agreements are similar. They not only anticipate plant closure and layoff but, in addition, they contain a provision which expressly proscribes the formation of an individual contract which "in any way" conflicts with the collective bargaining agreement (which if not a

"merger" clause, is at least akin to one). A Milne employee would have little cause to reasonably rely on alleged promises of job security because none is offered in the collective bargaining agreements, the agreements reserve to Milne the exclusive right to decide the plant's operational requirements, and any curb on that right imposed by an individual agreement is made expressly void. Yet, the Ninth Circuit and Solicitor General would deem these terms irrelevant to an assessment of reasonable reliance.

The Solicitor General's preoccupation with minor factual differences among the circuit courts' decisions overlooks the factual commonalities among the above-cited cases and this case. All of the cases concern collective bargaining agreements containing grievance and arbitration as the exclusive remedies for disputes over terms and conditions of employment, in particular termination and layoff. All of the cases share similar allegations — that the employer failed to disclose its intention to close its facility or reduce operations and misled its employees with promises of job security. None of the collective bargaining agreements contains a provision permitting fraudulent promises to employees, which the Ninth Circuit and Solicitor General suggest is the only provision which would "conflict" with an alleged fraudulent individual promise of job security and foreclose reasonable reliance. All of the circuits except the Ninth Circuit found state law claims for fraud preempted. Yet the Solicitor General advises the Court to wait for a more precise conflict. Petitioners respectfully submit that the inter-circuit conflict presented by the Ninth Circuit's decision is clear and that passage of time could produce no stronger conflict.

The inter-circuit conflict is not the only reason this Court should grant review. For some years there has been collective and considerable gnashing of teeth among the lower courts at the difficulty in applying consistently Section 301 preemption principles, even after *Lingle*. *See, e.g., Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991) (court acknowledged that despite authoritative statements in *Lingle* and *Allis-Chalmers*, "[i]n reality, section 301 has been the precipitate of a series of often contradictory decisions, so much so that 'federal preemption of state labor law has been one of the most confused areas of federal court litigation.' " (quoting Note, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims, 99 Yale L.J. 209 (1989)); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 539 (4th Cir. 1991) (Phillips, J. dissenting)- ("[my] disagreement . . .

simply reflects a wider inter-circuit conflict on this issue [Section 301 preemption analysis] that has developed in recent years as the lower federal courts have sought to apply the Supreme Court precedents . . ."), *cert. denied*, 112 S.Ct. 912 (1992); *Commodore v. University Mechanical Contractors, Inc.*, 839 P.2d 314, 318 (Wash. 1992) ("*Lingle* . . . gives little guidance as to what constitutes a state provided right. As a result, courts are still struggling to ascertain when a claim's resolution actually will involve interpretation or consideration of the CBA, and section 301 cases are still far from uniform or consistent, varying widely in their holdings, even after *Lingle*").

Quite apart from the conflict in the circuits, then, this case presents recurring and important issues of Section 301 preemption and provides an appropriate vehicle for this Court to promulgate needed guidance if the lower courts are to issue reconcilable results. Although this Court should ensure that truly independent state law claims proceed without interference of federal law, Section 301 preemption must have a scope broad enough to serve Congress' intent to preserve the vitality of grievance and arbitration as the preferred method of resolving claims such as respondents', which concern terms and conditions of union employment governed by a collective bargaining agreement. If decisions such as this one are allowed to stand, long-established and fundamental labor law cases such as *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), will be undermined, if not overruled *sub silentio*. In addition, the incentive for employers to enter into collective bargaining agreements with grievance and arbitration clauses will necessarily diminish as more union employees abandon grievance and arbitration remedies to resolve employment disputes.

II.

THE NINTH CIRCUIT'S DECISION THAT RESPONDENTS' CLAIMS ARE NOT PREEMPTED UNDER THE PRINCIPLES OF *GARMON* CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS AND THIS COURT.

The Solicitor General agrees with petitioners' contentions that the alleged conduct in respondents' complaint is arguably prohibited under the Act and that the Ninth Circuit's decision to the contrary was unfaithful to this Court's decision in *Garmon*. (Solicitor General's Br. at 12-14.) In addition, the Solicitor General notes that the state law

claims likely share a crucial element with an unfair labor practice charge that could be brought before the Board, thus satisfying this Court's decision in *Operating Engineers v. Jones*, and he criticizes the Ninth Circuit for wholly ignoring that decision and requiring instead that the controversies be "identical." (Solicitor General's Br. at 15-16.) Nonetheless, the Solicitor General concludes that there is no inter-circuit conflict sufficient to justify the grant of the petition for writ of certiorari. The Solicitor General not only fails to perceive correctly the nature of the inter-circuit conflict, but ignores the equally important reason for granting certiorari, based on his own analysis, that the Ninth Circuit's decision conflicts with this Court's decisions in *Garmon, Operating Engineers v. Jones*, and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) as well as Board authority. (Solicitor General's Br. at 13 n.13.) There is, therefore, independent justification to grant the petition for writ of certiorari, even absent a clear inter-circuit conflict, to ensure that the Board's jurisdiction over labor disputes will not be eroded.

In an effort to downplay the conflict among the circuit courts, the Solicitor General, like the Ninth Circuit, attempts to distinguish this case from cases in the Sixth, Seventh and Eleventh Circuits in which the courts have found similar alleged misrepresentations about plant closure to be preempted under *Garmon*. *See Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986); *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Kolentus v. Avco Corp.*, 798 F.2d 949 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987). In each of these cases, as in this one, the allegation that the employer concealed its decision to close and affirmatively misled the union and its employees was the cornerstone of the complaint. In the *Serrano* line of cases, the alleged misrepresentations for the most part were made to the union during concession bargaining, and the Solicitor General concludes, without analysis, that the Ninth Circuit's decision is therefore distinguishable because the alleged misrepresentations in this case purportedly were made outside the context of formal bargaining and directly to employees.

These factual dissimilarities are distinctions without a difference. The Solicitor General does not dispute petitioners' position that unfair labor practice charges based on bad faith bargaining or refusal to bargain are *not* dependent on the existence of formal ongoing negotiations. As set forth in the Petition (at 21), the law imposes a *continuing*

duty to bargain in good faith. Effects bargaining obligations, in particular, may frequently arise independently of formal negotiation schedules. The *Serrano* court correctly held, for example, that fraudulently misleading union employees about an impending plant closure after the conclusion of concession bargaining would violate the Act both because the employer has an independent obligation to bargain in good faith over the effects of closure and because the duty to bargain over concessions is an ongoing process. 790 F.2d at 1283, 1287.

Nor does the Solicitor General explain why purportedly lying to union employees about plant closure rather than to the union is a material distinction from the *Serrano* line of cases; indeed, since the duty to bargain extends to the union, bypassing the representative entirely to mislead employees about plant closure presents a far clearer case of an unfair labor practice because it embodies direct dealing and unilateral change as well as bad faith bargaining. *See Talbot v. Robert Mathews Distributing Co.*, 961 F.2d at 659-60 (allegations that employer allegedly failed to disclose pertinent facts to union employees and made misrepresentations regarding plaintiffs' transfer and termination of employment constitute conduct arguably prohibited by the Act as bad faith bargaining, despite absence of any bargaining with the union).

Similarly, the Solicitor General skates by the inter-circuit conflict presented by the Ninth Circuit's conclusions that the unfair labor practice and state law claims would not be "identical" and that the unfair labor practice would be of only peripheral concern to the Act. As discussed in the Petition (at 21-22), the unfair labor practice and state law claims are "identical": each depends on the finding that Milne made the alleged representations of job security knowing it had already decided to close the facility and that Milne withheld information about its decision to close after the decision was made. In contrast to the Ninth Circuit, the courts in the *Serrano* line of cases examined *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) and *Operating Engineers v. Jones* to find similar fraud allegations preempted. First, whether they applied *Sears* or this Court's later decision in *Jones*, the courts in *Serrano*, *Parker* and *Kolentus* found that allegations of misrepresentations about plant closure were sufficiently "identical" to the unfair labor practice charge which would be put before the Board. *Parker*, 855 F.2d at 1518; *Serrano*, 790 F.2d at

1285-86; *Kolentus*, 798 F.2d at 961. Second, in each of these cases the court determined that *Belknap* was inapposite because in *Belknap* the state law claims and unfair labor practice charges lacked identity, and because failure of an employer to bargain in good faith about the terms and conditions of employment is not "peripheral" but "strikes at the heart of one of the basic concerns of that law." *Serrano*, 790 F.2d at 1287. *See also Parker*, 855 F.2d at 1518, *Kolentus*, 798 F.2d at 961.

Respondents allege conduct which, if true, poses an unquestionable violation of the Act. The Ninth Circuit's decision materially conflicts with decisions from other circuits and, as the Solicitor General acknowledges, with this Court's decisions and Board authority. The Ninth Circuit's decision serves to defeat the primacy of the Board's jurisdiction over labor disputes. The decision should not be permitted to remain as controlling law within the Ninth Circuit or as guiding precedent for the rest of the circuits. As the Eleventh Circuit stated in *Parker*: "[e]roding the Board's jurisdiction over claims involving a failure to bargain in good faith will inevitably eviscerate the Labor Act and all that it has accomplished." 855 F.2d at 1518. In light of the Ninth Circuit's clear departure from this Court's decisions, acknowledged by the Solicitor General, it is appropriate for this Court to summarily reverse the decision below as to the second "Question Presented."

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: May 28, 1993.

Respectfully submitted,

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